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October 15, 2010

## By FedEx

Office of the Executive Secretary National Labor Relations Board 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570

Re: Expedited Re-consideration of Case Number 19-CD-502

Dear Mr. Heltzer:

Gordon & Rees LLP represents SSA Marine, Inc., (hereinafter "SSA") in the above referenced matter. We hereby respectfully request that the National Labor Relations Board (hereinafter "the Board") make an expedited decision in Case Number 19-CD-502 in light of the fact that this is a priority case that has been before the Board for well over a year as a result of the U.S. Supreme Court's decision in New Process Steel L.P. v. NLRB, No. 8-1457 (June 17, 2010), which invalidated the Board's prior decision in this matter in SSA Marine, 355 NLRB No. 3 (2010). Thus, the Board is obligated to act quickly to resolve this dispute. More importantly, we ask this because SSA is an innocent employer caught between two competing union's jurisdictional claims and the invalidation of the Board's decision has exacerbated SSA difficulties. Not only is SSA still caught in the middle of the jurisdictional dispute, but SSA is in a worse position than it was at the time the original 8(b)(4)(D) charge was filed in 2009. First, SSA has expended considerable resources in securing the initial decision and order by the Board. Second, SSA has expended resources in reliance on the work belonging to ILWU-represented employees, and third any further delay in the Board making an award could result in SSA suffering significant additional liability for back and frontpay should the Board elect not to timely decide this case. This liability cannot be attributed to any bad act by SSA. Rather the liability is the result of an innocent employer being caught between two warring unions. Similarly, SSA's ILWU represented employees are also in a worse position than they were in at the time of the original dispute, because of the uncertainty as to whether the Board will award the work to them and because of the potential additional legal expenses the ILWU will need to

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<sup>&</sup>lt;sup>1</sup> The two unions are the International Association of Machinists (hereinafter "the IAM") and the International Longshore and Warehouse Union (hereinafter "the ILWU").

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expend to preserve work for their members. Thus, SSA and its ILWU-represented employees should not be punished for delays in case processing. SSA therefore needs prompt relief.

At issue in the underlying case was whether IAM-represented or ILWU-represented employees had a greater claim to perform maintenance and repair (M&R) work at Pier 91 in Seattle, Washington. The terminal was new. As such neither union had performed any M&R work at the terminal for SSA. SSA elected to assign the work to the ILWU for legitimate business reasons. The IAM disputed the assignment and threatened to take any and all action necessary to force the reassignment of the disputed work. SSA filed an 8(b)(4)(D) charge, and the two-member Board awarded the performance of the M&R at Pier 91 to employees represented by the ILWU. After the Board issued its award, Terry Jensen, counsel for the IAM, agreed to refrain from coercing SSA into reassigning the M&R work to IAM-represented employees in consideration for the General Counsel dismissing the Section 8(b)(4)(D) charge. (See Jensen Compliance Signature). Mr. Jensen thus promised to accept the interlocutory decision of the two-member panel, and not to challenge the findings, how they were made, or the effect they had on the IAM's ability to continue to engage in coercive conduct.

Despite Mr. Jensen's pledge to Region 19 and the Board that he would refrain from coercing SSA into reassigning the work to IAM-represented employees, Mr. Jensen invoked Arbitrator Cavanaugh's jurisdiction and requested a hearing to determine how much back and front-pay SSA Marine should pay its IAM-represented employees for work they were never entitled to and never performed. Mr. Jensen asserts that because New Process Steel LP concluded that the Board lacked the authority to decide cases with just two members, the Board's assignment of the work is the underlying case is no longer binding, that the IAM is free to renege on its promise not to coerce SSA into reassigning the M&R work to IAM-represented employees, and that the IAM is therefore free to seek, and the arbitrator to award back and front-pay for SSA's alleged breach of the IAM CBA.

The Board should expedite its processes and reconsider this matter in light of the fact that an arbitration date of November 18, 2010 has been set. Given that the arbitrator is limited to making an award based on the IAM CBA, it is all but certain that the arbitrator will award significant backpay and frontpay for the disputed work since the arbitrator already concluded that SSA breached the IAM CBA in this regard. Should the IAM secure an award, it is also certain that the IAM will seek to have the award confirmed. Thus, it is almost certain that the arbitrator will make and a court could enforce a decision inconsistent with the Board's previous order in this case. Should this happen SSA will be compelled to reassign the M&R work to IAM-represented employees. Rob Remar, counsel for the ILWU, made clear to SSA in a letter dated October 13, 2010, that the ILWU will refuse to disclaim its interest in the work and will

Shortly after SSA assigned the work to ILWU-represented employees but before the 8(b)(4)(D) charge was filed, the IAM filed a grievance over the assignment pursuant to the SSA's collective bargaining agreement with the IAM (hereinafter "the IAM CBA"). Because Arbitrator Cavanaugh concluded that the IAM CBA arguably covered the disputed work, he found that SSA breached the collective bargaining agreement and that the SSA's IAM-represented mechanics were entitled to be made whole. As the arbitrator conceded, his decision and award was based solely on his reading of the IAM CBA and did not consider SSA's collective bargaining agreement with the ILWU (hereinafter "the PCLCD") as he had no jurisdiction over that PCLCD or over the ILWU. As such, the arbitrator was unable to say which unions' employees had a greater claim to the work.

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take any and all action to retain the work.<sup>3</sup> (See letter from Rob Remar) The Board could avoid this dilemma simply by expediting its consideration of this matter.

SSA will concede that the Board's decision in this case was not a final order of the Board capable of appeal and therefore the case was not remanded to the Board in light of New Process Steel. SSA will also concede that Region 19 dismissed the 8(b)(4)(D) charge underlying the case. However, the charge was dismissed only because the IAM promised not to coerce SSA into reassigning the work. The IAM is clearly disregarding its promise not to coerce SSA and therefore violating Section 8(b)(4)(D) of the Act. In fact, Mr. Jensen's assertion that the Board's award of the work to employees represented by the ILWU is invalid makes clear his belief that the IAM can now fairly claim the work. And this is precisely what the IAM is doing. Clearly, the IAM's pursuit of a front-pay award is intended to pressure SSA into reassigning the work to the IAM. Any characterization that pursuit of front-pay is not effectively a demand for the work is disingenuous. Mr. Jensen is well aware that an employer is not going to pay a workforce to do absolutely nothing. The request for front-pay is simply a thinly veiled attempt to coerce SSA Marine into reassigning the work in violation of Section 8(b)(4)(D). Thus, the dispute underlying the original Section 8(b)(4)(D) charge is alive, and the Board should adopt its earlier decision and order.

If you have any questions, please do not hesitate to contact me at (619) 230-7746.

Respectfully yours,

GORDON & REES LLP

Jim McMullen

Counsel for SSA Marine

cc: Ed DeNike
Terry Jensen
Rob Remar
Todd Amidon
John Fawley

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Mr. Remar also indicated that he believes the IAM invoked the arbitrator's jurisdiction for a hearing on make whole relief in order to coerce SSA into reassigning the M&R work to the IAM-represented employees.

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Re: International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289, and International Longshore and Warehouse Union (SSA Marine, Inc.)
Case 19-CD-502

The Charged Party Union in the above matter, International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289, acknowledges the National Labor Relations Board's January 22, 2010 Decision and Determination of Disputs in the above-entitled matter, that employees of SSA Marine represented by International Longshore and Warehouse Union are entitled to perform maintenance and repair work on SSA Marine's stevedoring and terminal service power equipment while it is present at Terminal 91 in Seattle, Washington. In addition, the Charged Party Union hereby agrees that it will refrain from forcing or requiring the Employer, SSA Marine, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees it represents.

international Association of Machinists and Aerospace Workers District Lodge 180, Local Lodge 289

By

Terry C. Jensen, Attomby

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2101 Fourth Ave, Suite 200 Seattle, WA 98121-2392

ATTACHMENT 2

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- CA bar results pending

REFER TO OUR FILE NO:

## By Email

PHIL THOMAS

October 13, 2010

Todd C. Amidon
Senior Counsel
Pacific Maritime Association
555 Market Street, Third Floor
San Francisco, CA 94105

Re: Seattle Cruise Ship Terminal M&R Work
(IAM Arbitration Award, dated May 8, 2009)

Dear Mr. Amidon:

I am writing on behalf of the International Longshore and Warehouse Union (ILWU). Our office, as ILWU General Counsel, just learned that the IAM has repudiated the NLRB's award under Section 10(k), which assigned the mechanics work at Seattle Picr 91 to ILWU-represented members. We also understand that IAM is now taking legal action to try to enforce the IAM Arbitrator's Decision and Award, dated May 8, 2009, made under the collective bargaining agreement between SSA Marine and IAM District Lodge No. 160. As you may know, this

LEONARD CARDER, LLP

Re: Seattle Pier 91 October 13, 2010

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Award purports to find that the performance of maintenance and repair work at the newly constructed Seattle cruise ship terminal facility falls under the terms of the IAM agreement. I think you also well understand that this arbitration award was immediately put on hold pending resolution of NLRB proceedings in the underlying case filed by SSA. Although the NLRB's two-member ruling in the prior Section 10k case may require a new determination by the current Board, this does not change the status quo – that IAM's claim to the work, presently performed by ILWU members, must remain on hold until a new and final decision issues from the NLRB in Washington, D.C.

As was stated in my letter to you of May 14, 2009, when this work jurisdiction dispute first began, please be advised that the ILWU rejects and repudiates the IAM Arbitrator's award. As a matter of law, the IAM arbitration award, obtained without the participation of the ILWU or the PMA, has no bearing whatsoever on the Coast Parties and their respective memberships. Nor does the IAM arbitration affect in any way the contractual obligations and established work practices between the ILWU and the PMA, and their respective memberships.

The ILWU vigorously submits that the maintenance and repair work in question squarely falls under the ILWU-PMA Pacific Coast Longshore and Clerk's Agreement (PCLCA). Please be advised that the ILWU will pursue all available and appropriate remedies, including appropriate, lawful economic/collective/job action to ensure that the maintenance and repair work at the Scattle cruise ship terminal remains under the PCLCA and continues to be performed by ILWU-represented mechanics. Please do not underestimate the ILWU's determination to keep this important work jurisdiction at all costs.

Should you have any questions please call.

Very truly yours,

LEONARD, CARDER, LLP

Robert S. Remar

cc: Rick Liebman, (PMA Counsel)
Jim McMullen (Counsel for SSA)
ILWU Coast Pro Rata Committee